IN THE

Supreme Court of the United States

October Term, 1957

No. 18

ROBERT H. MCNEILL, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, appellant below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above cause on January 11, 1958.

OPINIONS BELOW

The opinion of the Tax Court of the United States was dated March 11, 1957 and entered March 12, 1957. It is reported at 27 T.C. 899 (App. 1a).

The opinion of the United States Court of Appeals for the Fourth Circuit was filed on January 11, 1958, and is reported at 251 F. (2d) 863 (App. 16a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit here sought to be reviewed was dated and filed on January 11, 1958. (App. 21a)

A petition for a rehearing or in the alternative for a modification of the mandate to order the court below to take further testimony was timely filed with the United States Court of Appeals for the Fourth Circuit on March 1, 1958, and denied by the Court on March 17, 1958. (App. 23a)

On June 5, 1958, an order extending the time to and including July 16, 1958 within which to file petition for writ of certiorari was entered.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Is the character bestowed upon real property at the time of its acquisition thereafter retained unless subsequently changed by significant acts?

II. Is it improper for a trial court to disregard the uncontradicted testimony of an otherwise impeached witness?

STATUTES INVOLVED

The pertinent statutes are as follows:

Sec. 23. *Deductions from Gross Income.*

In computing gross income there shall be allowed as deductions:

Sec. 23 (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the tax-

able year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

Sec. 117 (a) *Capital Gains and Losses.*

(a) Definitions.—As used in this chapter—

(1) Capital assets—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), or real property used in his trade or business.

Sec. 117 (j) *Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) Definition of property used in the trade or business.—For the purposes of this subsection the

term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (b) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *.

STATEMENT OF FACTS

Petitioner is an individual, 82 years of age, who was admitted to the Bar in 1898. He is now, and has been for over fifty years active in real estate in addition to the practice of his profession of law.

About 1916, Petitioner and two associates commenced a development known as Potomac Heights, situated on the Potomac River near Washington, D. C. As individuals they subdivided the acreage and built homes. There are presently around 300 homes in the subdivision.

Shortly thereafter petitioner purchased additional acreage in the same area, which he likewise subdivided. Lots in this development, known as Albany Park, were then sold to individual purchasers.

Several years later petitioner became active as an officer in a land company which developed a subdivision known as Spring Lake Park, located near Rockville, in Montgomery County, Maryland. This subdivision consisted of around 400 lots. The systematic selling of these lots was temporarily interrupted by

the depression. Petitioner, as an individual, still owns lots in this subdivision.

In 1924 petitioner acquired in excess of 800 acres, about ten miles from Altoona, Pennsylvania. This property was located on a plateau on Wopsononock Mountain at an elevation of about 2800 feet.

At the time he acquired this property it was his intention to make a profit by developing and selling lots. Experienced engineers were employed who surveyed the property and prepared the necessary plats showing lots which thereafter were offered for sale, both privately and at auction. In addition, petitioner expended the necessary funds to build a road through a heavy forest to the top of the plateau in order to make them accessible.

From the time of acquisition in 1924 until his equity of ownership was extinguished in 1946, petitioner made a continuous effort to develop and sell the property. In this connection, he retained an attorney experienced in real estate matters and also employed a prominent realtor, both of whom were located in that community. The realtor in turn employed various agents and salesmen. Lots were extensively advertised for sale not only in the newspapers but also by circular letters and individual letters written by petitioner and the realtor. As part of the intensive selling campaign, an elaborate auction was attempted during 1925. It had been preceded by a strenuous advertising campaign. Approximately 500 prospective purchasers were in attendance at the auction which ended in a complete failure when a sudden storm developed and the crowd dispersed.

Thereafter, as part of his continuing effort to make the area more attractive, petitioner devoted much time and activity in unsuccessful efforts to interest the Federal Government, the State of Pennsylvania and Blair County in using a portion of the land to develop a park project. Likewise a strenuous effort was made to develop an airport. In connection with these attempts petitioner personally devoted much time and effort and additionally employed agents.

Although these combined efforts eventually resulted in various commitments from the Federal and State Governments, as well as Blair County, they finally proved unsuccessful.

Meanwhile in the early 1930's petitioner had acquired acreage at Front Royal, Virginia. This land was developed and subdivided by petitioner and he still retains a substantial interest in the unsold lots remaining in this development.

In addition petitioner's activities also include the purchase, development and sale of properties in Montgomery County, Maryland, as well as individual lots in Washington, D. C.

Further petitioner has purchased acreage in various sections of North Carolina, which he thereafter developed and sold. Not heretofore mentioned is other development property located in the State of Virginia still owned by petitioner.

Further real estate activities of petitioner include the organizing and active participation in a real estate company that acquired the land and thereafter constructed the Southern Building, an office building in Washington, D. C. He was also active in financing

the Lafayette Office Building and Veterans Administration Building, as well as the Roger Smith Hotel, all in Washington, D. C., and the Congressional Country Club in Montgomery County, Maryland.

Petitioner testified unequivocally that he has been active in the real estate business each year since coming to Washington in 1903.

Petitioner was the only witness who testified at the hearing before the Tax Court and the uncontradicted testimony of this unimpeached witness was entirely consistent with the facts otherwise proved.

In 1940 the Wopsononock property previously referred to was seized by the authorities of Blair County, Pennsylvania, for unpaid real estate taxes. These authorities retained title to this property for a number of years while trying unsuccessfully to sell it. Eventually on December 5, 1946, the political subdivision holding title to the property sold it to the Royal Village Corporation and transferred title to the purchaser by deed. On this date, the statutory right of redemption which had heretofore remained in petitioner was extinguished by operation of law. See Purdon's Pennsylvania Statutes Anno. (Perm. Ed.), Secs. 5971(p), 5971(q) and 6105.1.

After 1940, despite the fact that the property had been seized by public authorities, petitioner persisted in his efforts to sell the property for the reason that so long as the right of redemption existed there still remained the possibility that he could realize a profit. These efforts by petitioner and his agents continued until the right of redemption was in fact extinguished in 1946.

On his income tax return for the taxable year 1946, petitioner deducted $11,000 as an ordinary loss resulting from the seizure and sale of the Wopsononock property.

The Statutory Notice of Deficiency issued by the Commissioner of Internal Revenue disallowed the deduction as follows:

> "The claimed deduction of $11,000 alleged to represent a loss incurred in connection with certain real estate is disallowed as not representing an allowable deduction for Federal tax purposes."

The Tax Court of the United States had jurisdiction pursuant to the provisions of 26 U.S.C. 6213 (a) and 7442.

The petitioner was the only witness to testify in the proceedings in the Tax Court. His testimony was uncontradicted and he was not otherwise impeached. On direct, cross and redirect examinations, he stated that he had been active in the real estate business for approximately 50 years; that this period of activity included not only the year 1946 in which the loss was claimed but also each of the approximate 40 years preceding and 10 years subsequent thereto; and that the scope of this real estate activity included not only the property in Pennsylvania, but simultaneously many other properties and real estate transactions all of which together formed a continuous pattern going to make up his "real estate business."

In its opinion, the Tax Court disallowed the loss as resulting from a transaction between related taxpayers and thus prohibited by Section 24(b) of the Internal Revenue Code of 1939. Although unneces-

sary to its conclusion, the Tax Court found as a fact that in 1946 the property was not held by petitioner for sale to customers in the ordinary course of his business. A further finding of the Tax Court however was that petitioner's attempts to sell the land after its seizure by officials and his offering in 1946 to satisfy the mortgage outstanding against the property demonstrated his intention to retain control over it.

The Court of Appeals held that Section 24(b) was not applicable but concluded that since the Tax Court had found that petitioner was not engaged in the real estate business that they were bound by this finding. On this basis, they reversed and remanded to the Tax Court with instructions to allow the loss within the limitations of the capital loss provisions.

ARGUMENT

I. The Character Bestowed Upon Real Property At the Time Of Its Acquisition Is Thereafter Retained Unless Subsequently Changed By Significant Acts.

The following facts found by the Tax Court contradict their determination that the Wopsononock property was a capital asset instead of an ordinary asset held by petitioner primarily for sale to customers:

> (a) Petitioner acquired the Wopsononock property with the intention to develop and subdivide the land and then sell lots to the public at auction or through separate sales transactions. (App. 2a.)
>
> (b) In this connection experienced engineers were employed to survey the property and prepare plats of the land being offered for sale. (App. 2a, 3a.)

(c) At his own expense, petitioner built a road through the forest to the top of a plateau where the lots held for sale were located. (App. 3a.)

(d) Petitioner repeatedly advertised the lots for sale; he employed a prominent realtor in the community to list the property and extensive sales efforts were made. (App. 3a.)

(e) After the failure of these efforts, petitioner further attempted to promote the sale of his land by developing an airport project within the area and also by trying to interest the State of Pennsylvania in developing a public park on the land. (App. 3a.)

(f) Following the failure of all these efforts and projects, the property was seized by county officials for taxes in 1940. (App. 3a.)

(g). Petitioner, however, continued his efforts to sell all or any part of the land since under Pennsylvania law he still retained a right of redemption. (App. 3a.)

(h) In 1946 the property was sold by the public officials and at this moment, by operation of law, petitioner's equity of redemption was extinguished. (App. 8a.)

(i) On his income tax return for the taxable year 1946, petitioner deducted as an ordinary loss the amount of $11,000 as being his basis in the property. (App. 4a.)

In its opinion the Tax Court in commenting on the extent of petitioner's activities between the time when the land was seized for taxes in 1940 and the time when

his right of redemption was lost in 1946, stated as follows: (App. 6a).

> "* * * moreover, his conduct in further attempting to sell the land after its seizure by Blair County and in offering to satisfy the mortgage outstanding against the property in May 1946, demonstrates his intention to retain control over it. * * *"

The evidentiary facts as found by the Tax Court will support no legal conclusion other than that petitioner acquired this property primarily for sale to customers. As property so held it was an ordinary asset and it is axiomatic, as stated in *Goldberg* v. *Commissioner* (CA 5, 1951), 223 F. 2d 709, that real property does not lose the character bestowed upon it at the time of its acquisition unless there is first established affirmative and significant acts to show a change of original intent.

> "* * * the original purpose is important for to counterbalance it there must be significant suggestive evidence of a change in that purpose."

Contrary to its evidentiary findings, previously set forth, the Tax Court concluded that Petitioner was neither in the real estate business nor was the property held by him primarily for sale in 1946. (App. 5a.)

The Court of Appeals found that the petitioner made diligent efforts to sell the property in the years immediately following its acquisition and was in fact in the real estate business at that time but concluded that they were bound by the finding of the Tax Court as to petitioner's status during 1946. (App. 19a, 20a.)

It is petitioner's position that having once determined that petitioner was engaged in the real estate

business and that the property was held by him primarily for sale to customers, it then becomes necessary, within the principle of the *Goldberg case, supra,* as a condition precedent to altering the character of the land from an ordinary asset to a capital asset, that there first be established some identifying event or other significant evidence justifying the change in purpose.

In the instant case, there is a complete lack of any legally significant or sufficient evidence tending to establish a change in the intent or purpose for which the land was held.

The seizure of the property for taxes by public authorities and the subsequent loss of the right of redemption is certainly not an event that *per se* converts property from an ordinary asset to a capital asset. In this respect, however, the Tax Court appears to have been misled by the Commissioner's argument as to the principle set forth by this Court in *Helvering* v. *Nebraska Bridge Supply & Lumber Co.* (1941), 312 U.S. 666. As stated by that Court, the Commissioner argued as follows: (App. 6a).

> "In the alternative, respondent asserts that if any loss is allowable it is at most a long-term capital loss arising from the sale during 1946 of a capital asset, relying upon the decision of the Supreme Court in *Helvering* v. *Nebraska Bridge Supply & Lumber Company,* 312 U.S. 666."

The Tax Court's obvious misinterpretation of the *Nebraska Bridge case, supra,* is shown by the following language from their opinion: (App. 7a).

> "* * * Accordingly, any loss resulting from the expiration of his equity of redemption of the land in question by petitioner herein is in the nature of

> a capital loss and, if allowed, is subject to the limitations of 117 (d) of the 1939 Code."

In this connection, it is petitioner's view that, correctly interpreted, *Nebraska Bridge, supra,* merely holds that a tax foreclosure and extinguishment of a right of redemption may be regarded as a "sale or exchange" for the purpose of applying Sec. 117, if the asset involved was a capital asset. If, however, the asset was not a capital asset and the loss is otherwise recognizable under some other section of the Internal Revenue Code, it is to be so allowed. See *McCarty* v. *Cripe* (CA 7, 1953) 201 F. 2d 679 wherein on facts not unlike those here involved, the Court said:

> "* * * no question is made but that the decedent lost $34,425.16, his investment in the Euclid Farm, and that it was an allowable deduction generally for uncompensated business losses."

The Tax Court's erroneous view was then compounded to petitioner's detriment by their apparent rationale that under the doctrine of *Nebraska Bridge* any loss suffered as the result of the extinguishment of a right of redemption was a capital loss. Since it was a capital loss it must result from the sale or exchange of a capital asset and therefore the property here involved must, by analysis, be a capital asset.

Nor can the fact that there were no sales of the property for several years be regarded as significant evidence suggestive of a change in the purpose for which the land was held. This is particularly so when such failure is the result of business adversity for these factors do not change the primary purpose for which property is held. *Julius Goodman* (1939) 40

BTA 22; *Walter G. Morley* (1947) 8 T.C. 904; *Orrin E. Boyle* (Feb. 9, 1942) Memo. Op., Doc. 105503; *Harry F. Payer* (Oct. 8, 1946) Memo. Op., Doc. 7701; *Factoria Land Co.* (Feb. 28, 1947) Memo. Op., Doc. 2702; *Ethel S. White* (Sept. 25, 1947) Memo. Op., Doc. 12570, aff'd (CA 5, 1949) 172 F. 2d 629; *Ambassador, Inc.* (Sept. 30, 1952) Memo. Op., Doc. 29629; *Burns* v. *Commissioner* (CA 4, 1955) 219 F. 2d 128.

In *Alfred Kruse* (1957) 29 T.C. No. 51, the Tax Court correctly states the fundamental principle that the character bestowed upon real property at the time of its acquisition is not changed by mere inactivity.

> "We think there can be no doubt that mere discontinuance of the active use of the property does not change its character previously established as business property."

In *Walter G. Morley* (1947) 8 T.C. 904, on facts parallel to those in the instant proceeding, the Court found that the taxpayer's activity was not restricted or halted by reason of any change in his plans or purposes but rather by the force of economic circumstances beyond his control. They concluded that the *character of the losses was not controlled by the absence of business activity in the year of loss:* (italics supplied)

> "There can be no question but that the business of buying and selling real estate was regularly carried on by Petitioner prior to 1931. The properties here in question were purchased or acquired by Petitioner for reselling for a profit before that date. Even though we should assume, *arguendo*, that the business of selling real estate although engaged in by Petitioner in 1940, was not one regularly carried on by him in that year, nevertheless, we would conclude that the losses in ques-

tion were attributable to a business of buying and selling real estate which was regularly carried on by him in years prior to 1940; and this conclusion would render inoperative the limitation of Section 122 (d)(5)."

In *Carter-Colton Cigar Co.* (1947) 9 T.C. 219, the Court correctly decided that the real property there involved was used in the trade or business of the taxpayer within the meaning of the statute when it was purchased by him for a business purpose despite the fact that:

> "* * * full or maximum use, of course, had not yet been made, and was finally prevented by latent developing circumstances over which Petitioner had no control.
>
> "Where the statute allows deductions for depreciation of property 'used in the trade or business' it has been held that 'used in the trade or business' means 'devoted to the trade or business' and includes all such property whether actually in use during the taxable year or not. *Kittridge* v. *Commissioner*, 88 F. 2d 632; *Yellow Cab Co. of Pittsburgh* v. *Driscoll*, 24 F. Supp. 993; *P. Dougherty Co.*, 5 T.C. 791-795. * * * its character as 'real property used in * * * trade or business continues after the planned use becomes impossible. *Solomon Wright, supra.*"

In *Solomon Wright, Jr.* (1947) 9 T.C. 173 the Tax Court concluded that real estate originally used for business did not become a capital asset merely because it had ceased to be property actively used in the taxpayer's business.

Despite the apparent views of the Tax Court to the contrary, the fact that petitioner as an individual

never held a real estate license is not significant to establish the property as a capital asset. *C. E. Mauldin* (1951) 16 T.C. 698, aff'd (CA 10, 1952) 195 F. 2d 714; *Gruver* v. *Commissioner* (CCA 4, 1944) 142 F. 2d 363; *Richards* v. *Commissioner* (CCA 9, 1936) 81 F. 2d 369; *King* v. *Commissioner* (CA 5, 1951) 189 F. 2d 122, cert. denied (1951) 342 U.S. 829.

Both the Tax Court and the Court of Appeals agree that petitioner acquired the property with the intention of developing it and selling lots. In this connection, they each recognize that he did everything humanly possible to succeed in his venture. Yet because at age 70, which he was in 1946, he was not demonstrating the same vigor he did nearly a quarter of a century earlier when he acquired the land they therefore seemingly conclude that as to him the property had become a capital asset.

And they nevertheless come to this conclusion despite making positive findings to the effect that his activity with respect to this property continued after its seizure in 1940 and through 1946, when his right of redemption was extinguished. For as the Tax Court stated: (App. 6a)

> "* * * moreover, his conduct in further attempting to sell the land after its seizure by Blair County and in offering to satisfy the mortgage outstanding against the property in May 1946, demonstrates his intention to retain control over it. * * *"

The findings and conclusions of the Tax Court, as well as those of the Court of Appeals are clearly erroneous. It is, therefore, the function of this Court to examine the foundation for these findings. *Baumgartner* v. *U.S.* (1944) 322 U.S. 665.

II. The Tax Court Improperly Disregarded the Uncontradicted Testimony of the Petitioner.

Where the testimony of an only witness is not contradicted, nor is he otherwise impeached and his testimony is not inherently improbable, it cannot be disregarded. On a petition to review a decision of the Tax Court where, as here, the facts were not in dispute but wrong legal conclusions were attached to them, the Court of Appeals is not bound to respect them but should draw different and correct conclusions of its own. *Wener* v. *Commissioner* (CA 9, 1957) 242 F. 2d 938.

The findings of fact made by the Tax Court in the instant proceeding conclusively establish that the property here involved was held primarily for sale to customers at all times until the equity of redemption was extinguished in 1946. As a matter of law it follows therefore that the property was an ordinary asset and the loss in 1946 can only be an ordinary loss. Upon the evidentiary facts found by the Tax Court, its ultimate conclusion as to the character of the property is clearly a *non sequitur*.

Where, neither the credibility of the witness nor conflicting facts are involved, a Court of Appeals is not bound by the legal conclusion of the Tax Court. In so far as the so-called ultimate fact is simply reached by processes of legal reasoning from, or the legal significance of, evidentiary facts, the required review is free from the restraining impact of the so-called "clearly erroneous rule," and it is the duty of the Appellate Court to draw its own inferences from undisputed facts. *Gamble* v. *Commissioner* (CA 5,

1957) 242 F. 2d 586; *Galena Oaks Corp.* v. *Scoffield,* CA 5 (1954) 218 F. 2d 217; and *McGah* v. *Commissioner,* CA 9 (1954) 210 F. 2d 769.

In *Foran* v. *Commissioner,* CA 5 (1948) 165 F. 2d 705, the Court of Appeals having determined that the conclusions of the Tax Court were based solely on the testimony of the taxpayer reversed and stated as follows:

> "The Tax Court believes everything that Foran said except his positive testimony * * * but it refused to accept his oath that the sale was thus caused and held it was for sale all the time in the course of his business. * * *
>
> "Here there is direct and positive evidence from the witness who best knows, that this property was for eighteen months being held as an investment and not held for sale to customers. His testimony is consistent with every proven fact. He gives a credible reason why it was not for sale and why finally in 1941 he did sell it. We think the court's refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury. We quote from Pennsylvania R.R. Co. v. Chamberlain, 288 U.S. 333, at page 340, 53 S. Ct. 391, 394, 77 L.Ed. 819, "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the fact of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples: (citing cases).

A rebuttable inference of fact * * * 'must necessarily yield to credible evidence of the actual occurrence.'"

This Court in *Pennsylvania R.R. Co.* v. *Chamberlain* (1933) 288 U.S. 333 concluded that an inference of the existence of a particular fact from other proven facts is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts inferred did not exist.

The petitioner testified that he had been active in the real estate business for a period exceeding fifty (50) years and that this period of activity included not only the taxable year 1946 but also the forty (40) years preceding and approximately ten (10) years subsequent. The scope of this activity included not only the property here involved but simultaneously many other properties all of which taken together formed a continuous pattern going to make up his real estate business.

There is nothing of record to contradict the testimony of petitioner herein and the Tax Court therefore erred as a matter of law in disregarding the fundamental principle enunciated by this Court in *Pennsylvania R.R. Co., supra* and followed in *Foran* v. *Commissioner, supra.* In fact, the findings made by the Trial Court respecting the taxpayer's activities and their further conclusion that his continued activities after the property had been seized by public officials were so extensive as to negate an abandonment are clearly inconsistent with their ultimate finding that the

property was not held primarily for sale for the reason that he was inactive.

In any event, the Tax Court's finding in this respect is no more than *obiter dictum* for the reason that it ultimately concluded that no loss was allowable. In the circumstances, the conclusion that if a loss had been allowed it would have been a capital loss, not being necessary to their ultimate disposition in the case, it becomes a gratuitous conclusion and certainly not binding upon the appellate court.

CONCLUSION

The effect of the decisions below is to deny petitioner a business loss from a venture that he struggled with continuously through depressions and other adversities for more than twenty (20) years. His sole purpose in buying the property and trying thereafter to sell it was to make a business gain as the result of his risk and efforts. Instead of a gain, however, circumstances were such that an $11,000 loss was the result.

The facts found by the Tax Court and the Court of Appeals with respect to the purchase and persistent efforts thereafter to sell the Wopsononock property conclusively establish as a matter of law that this property was bought and held by Petitioner as a business asset and not as a capital asset. The conclusion to the contrary is an error that should be corrected by this Court.

Additionally, the Court of Appeals erred by not remanding these proceedings to the Tax Court for further testimony. See *Burns v. Commissioner, supra,*

> "* * * We are satisfied that under the theory applied in cases decided by the Tax Court to the

> effect that real estate acquired for use in a trade or business may not necessarily lose that status if plans to use it are frustrated, the Tax Court should, in this case consider this issue before it is passed on by this Court."

It is respectfully suggested that this Court should review these proceedings in order to resolve the hopeless conflict that presently exists as the result of the many irreconcilable Tax Court and Appellate Court decisions. The principle involved is of vital importance not only to petitioner but also to the many other taxpayers similarly situated. As stated by the former Chief Judge of the Tax Court in *Robert G. Elbert*, T. C. Memo. 1957-108.

> "The general question involved is one of the most litigated in the Tax Court."

A review of the instant record will establish that the facts as found by the Tax Court support his legal conclusion other than that petitioner was in the real estate business and the property involved was held by him primarily for sale to customers in the year 1946.

The Tax Court erred as a matter of law on the following grounds:

1. Their conclusion is not supported by, but is in fact contrary to and contradicted by their own evidentiary findings.

2. Their conclusion is contrary to the uncontradicted testimony of an otherwise unimpeached witness as to his intent with respect to the property.

The Court of Appeals erred as a matter of law on the following grounds:

1. They are not bound by a conclusion that is erroneous as a matter of law.

2. They are not bound by a finding of the lower court that was not necessary to its ultimate conclusion. The character of the loss as determined by the Tax Court was *obiter dictum* for the reason that they concluded that no less was allowable as a matter of law. Their voluntary expression as to the type of loss it might otherwise have been is not binding upon the appellate court.

Petitioner respectfully suggests that a remand would be desirable so as to enable the lower court to take further testimony in order that they might then make further and necessary findings after they have all of the material facts before them.

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